In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. [illegible]

ROBERT BURKS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,
First Appellate District, Division Two.

GEORGE OLSHAUSEN,
[illegible]
San Francisco, California
Attorney for Petitioner.

Subject Index

	Page
Opinion of lower court	2
Questions presented for review	3
Statutes and rules involved	3
Statement of the case	4
Jurisdiction of lower courts	6
Reasons for granting writ of certiorari	6
I. The unsupported excessive part of a judgment and sentence is a deprivation of liberty without due process of law in violation of the XIVth Amendment to the United States Constitution	7
II. Where Constitutional issues are involved they may be raised after time for appeal has expired (or after affirmance)	10
III. If State Courts grant no remedy to protect federal rights in criminal cases, United States Courts will do so	10
Conclusion	11

Table of Authorities Cited

Cases	Pages
De Jonge v. Oregon, 299 U.S. 353	3, 5, 8, 9
Herndon v. Georgia, 295 U.S. 441	6, 10
Herndon v. Lowery, 301 U.S. 242	6, 10
In re Carmen, 48 Cal. 2d 851	6, 7
Johnston v. Zerbst (1938) 304 U.S. 458	7, 10

Pages

McNeal v. Culver (Jan. 23, 1961) 5 L. Ed. 445 ..... 7, 10

Mooney v. Holohan, 294 U.S. 103 ..... 7, 10

Moore v. Dempsey, 261 U.S. 86 10

People v. Carmen, 43 Cal. 2d 342 6

People v. Mintz, 106 Cal. App. 725, 290 P. 93 2

Petition of Carmen, 165 F.S. 942 6

Stromberg v. Calif., 283 U.S. 359, 45 L. Ed. 1117 2

Thompson v. Louisville, 362 U.S. 199 ..... 3, 5, 6, 7, 8, 9

Woods v. Nierstheimer, 328 U.S. 211 ..... 7, 10

Codes

California Penal Code:

Section 187 ..... 1, 3
Section 188 3
Section 190 3
Section 190.1 3
Section 192(1) 3
Section 192(2) 3
Section 193 3
Section 790 6
Section 1181(6) 3
Section 1239 3

28 U.S.C.:

Section 1257(3) 2

Constitutions

California Constitution:

Article VI, Section 4a and 4b 6
Article VI, Section 5 6

United States Constitution:

Amendment XIV 3

In the Supreme Court
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No.

ROBERT BURKS,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California, First Appellate District, Division Two.

Robert Burks, defendant in the Superior Court of the State of California, in and for the City and County of San Francisco, on a charge of murder (Cal. Pen. Code 187), appellant in the District Court of Appeal of the State of California, First Appellate District, Division Two, petitions for a Writ of Certiorari to review the latter court's affirmance of an order of the said Superior Court denying defendant-petitioner's

motion to reduce the judgment to something less than murder of the first degree, on the ground that, as a matter of law under California law, the evidence did not show murder of the first degree, i.e., did not show the crime for which defendant-petitioner was adjudged guilty and imprisoned, but showed a different and lesser crime, if any.

OPINION OF LOWER COURT

The opinion of the District Court of Appeal, State of California, First Appellate District, Division Two, appears at R. 35. This is the only opinion in the lower courts. It is reported at 189 ACA 329, 11 Cal. Rptr. 200. The District Court of Appeal denied a Petition for Rehearing on March 23, 1961 (R. 36), and the Supreme Court of California denied a Petition for Hearing on April 19, 1961. The Order denying hearing appears at R. 37. A copy of the opinion of the District Court of Appeal is attached as Appendix "A" to this Petition. A copy of its Order Denying Rehearing is attached as Appendix "B". A copy of the California Supreme Court's order denying a hearing is attached as Appendix "C". On July 12, 1961, the Hon. Hugo L. Black extended petitioner's time to petition for a Writ of Certiorari to and including August 17, 1961; and on August 9, 1961 Justice Black further extended the time to August 28, 1961. The Supreme Court has jurisdiction to review the judgment of the District Court of Appeal of California (as the highest state court, under 28 U.S.C. 1257(3). Cf. *Stromberg v. Calif.*, 283 U.S. 359, 45 L. Ed. 1117, *sub nom. People v. Mintz*, 106 Cal. App. 725, 290 P. 93).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Where it is claimed (and, at least for purposes of argument, not denied by the State Court) that a man has been sentenced and imprisoned for a crime greater than any shown by the evidence, is the *excessive part* of the judgment and sentence unconstitutional and void as in violation of the due process clause of the XIV amendment to the United States Constitution for the same reasons that the entire judgment and sentence were unconstitutional and void for lack of supporting evidence of *any* crime in *Thompson v. Louisville,* 362 U.S. 199, 206, and because of the failure of the pleadings to charge a crime which was assumed to have been shown by the evidence in *De Jonge v. Oregon,* 299 U.S. 353, 362?

2. Where the above point is explicitly raised before a state court, may the state court overrule the point without stating what it is or discussing it on the merits?

STATUTES AND RULES INVOLVED

California Penal Code Secs. 187, 188, 190, 190.1;

California Penal Code Secs. 192 (1) and (2), 193;

California Penal Code Sec. 1181 (6);

California Penal Code Sec. 1239.

The text of these statutes is set forth in Appendix "D" to this Petition. A copy of the first section of

Appellant's Opening Brief in the District Court of Appeal, showing federal questions raised, is attached as Appendix "E".

STATEMENT OF THE CASE

The case is partly stated in the opinion of the District Court of Appeal. It sets forth the following part of the facts and proceedings:

(R. 35, Appendix "A", pp. i-ii):

> "The appellant was indicted for first degree murder on July 17, 1958. Trial by jury began on January 5, 1959; during the trial appellant's counsel and the district attorney stipulated that the death of the victim resulted from a gunshot wound from a gun fired by the defendant. Upon submission the jury found him guilty of first degree murder. Thereafter appellant waived his right to jury consideration of the issue of the penalty which was then determined by the court and on January 22, 1959 the court sentenced him to the state prison for the term prescribed by law. No appeal was taken, . . .
>
> "The appellant's first contention is that the evidence was insufficient as a matter of law to show willful, deliberate and premeditated intent to kill required to sustain a finding of first degree murder. . . ."

(R. 35, Appendix "A", p. iii):

> "Counsel points to that portion of appellant's application which carries the designation 'Motion for Reduction of Sentence' and contends that under such a pleading appellant can at this time

and stage of the proceedings question the sufficiency of the evidence . . ."

(R. 35, Appendix "A", p. v):

"The arguments with reference to the alleged constitutional questions are 'ingenious but we are not convinced of their applicability. It is apparent that the appellant should have sought relief for the alleged insufficiency of the evidence through the historic remedial process provided, namely, appeal from the judgment.'

"Order Affirmed."

As can be seen from the above quotation, the District Court of Appeal did not state what the constitutional contentions were. They were (a) as mentioned above, that *as to the excess* of petitioner's judgment and sentence beyond the utmost shown by the evidence, the same constitutional question arises which was decided in favor of the defendant in *Thompson v. Louisville*, 362 U.S. 199, and *De Jonge v. Oregon*, 299 U.S. 353; (b) such a constitutional question may be raised notwithstanding that the time for appeal under state law has expired.

The District Court of Appeal assumes for purposes of argument that the evidence fails to show first degree murder, and that petitioner was guilty only of some lesser crime. It overrules the constitutional argument based upon this state of affairs without discussion or even exposition of the contentions. For this reason only the Clerk's Transcript in the court below is brought up as a record.

JURISDICTION OF LOWER COURTS

The Superior Court of the State of California in and for the City and County of San Francisco had jurisdiction of the charge of first degree murder (allegedly committed in the City and County) under California Constitution Art. VI, Sec. 5 and California Penal Code Sec. 790. These are set forth in Appendix "D". The California District Court of Appeal of the First Appellate District had jurisdiction of an appeal from a judgment of first degree murder, with imprisonment for life committed in San Francisco under California Constitution Art. VI, Sec. 4a and 4b.

REASONS FOR GRANTING WRIT OF CERTIORARI

There are three reasons why certiorari should be granted to review the holding of the District Court of Appeal, overruling constitutional arguments without stating them:

1. The substantive ground that where no evidence supports conviction on a major rather than a minor crime, the same constitutional issue arises as to the *excessive* part of the judgment and sentence as arose as to the entire judgment and sentence in *Thompson v. Louisville*, 362 U.S. 199, 206;

2. Where constitutional issues are involved, they may be raised even after the time for appeal has expired (or after affirmance on appeal). Compare *Herndon v. Lowery*, 301 U.S. 242, with *Herndon v. Georgia*, 295 U.S. 441; *Petition of Carmen*, 165 F.S. 942 with *People v. Carmen*, 43 Cal. 2d 342 and *In re Carmen*,

48 Cal. 2d 851; see also *Mooney v. Holohan,* 294 U.S. 103; *Johnson v. Zerbst,* 304 U.S. 458; *McNeal v. Culver* (Jan. 23, 1961) 5 L. Ed. 445.

3. Where the state courts do not grant a remedy for violation of constitutional rights (especially in criminal cases), the United States Courts will grant a remedy. *Woods v. Nierstheimer,* 328 U.S. 211, 217.

We take up these points in order.

I. THE UNSUPPORTED EXCESSIVE PART OF A JUDGMENT AND SENTENCE IS A DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE XIVTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As we have already mentioned, the District Court of Appeal does not dispute that under California law the evidence fails to show murder of the first degree. *For purposes of decision it assumes this to be true.* (The lower grades of homicide under California law are second degree murder, Pen. C. 189, App'x "D", and manslaughter, Pen. C. 192.1 and 192, Appendix "D".) Consequently, we have the question in its pure form, whether imprisonment for a crime *in excess* of the maximum shown by the evidence raises the same constitutional issues as to the *excess of the sentence,* which arose as to the entire sentence where no crime at all is shown, as in *Thompson v. Louisville,* 362 U.S. 199. The reasoning of *Thompson v. Louisville* points to the conclusion that there is no legal difference between the situation where no crime at all is shown and where it is conceded that the evidence

shows less than the crime for which the defendant has been convicted and imprisoned. This is so because *Thompson v. Louisville*, 362 U.S. 199, bases itself on *De Jonge v. Oregon*, 362 U.S. 199, 206:

> "Just as 'conviction upon a charge not made would be sheer denial of due process', so it is a violation of due process to convict and punish a man without evidence of his guilt."

The quotation within the quotation is from *De Jonge v. Oregon*, 299 U.S. 353, 362. In *De Jonge v. Oregon*, 299 U.S. 353, the question *was* involved whether a man might be convicted on one charge rather than another. So it was held to be an immaterial difference that in *Thompson v. Louisville* the evidence did not support any crime whatever.

In *De Jonge v. Oregon*, 299 U.S. 353, the crime charged was held to involve a deprivation of liberty without due process in that the crime charged in the indictment denied freedom of speech and of assembly. It was suggested, however, that the evidence *perhaps supported a different* crime and that the conviction could and should be upheld on that basis. But here the Supreme Court made the holdings quoted in *Thompson v. Louisville*, 362 U.S. 199, 206:

> "Conviction upon a charge not made would be sheer denial of due process."

In other words, there must be a correspondence between the sentence and the crime charged. And this requirement holds *when it is a matter of picking one of several crimes—not merely where no crime at all is involved.*

Thompson v. Louisville, 362 U.S. 199, 206, quotes and follows the *De Jonge* case, saying that exactly the same constitutional question is presented by the insufficiency of the evidence to support the judgment and sentence as by the insufficiency of the pleadings to support the judgment and sentence. And while it is true that *Thompson v. Louisville* presented only the insufficiency of the evidence to support ***any*** crime, its complete adoption of the rule of *De Jonge v. Oregon,* 299 U.S. 353, 362, indicates that the same rule would be followed where the evidence is insufficient to support the particular crime of which the defendant has been adjudged guilty and for which he has been sentenced. (As already noted, the District Court of Appeal seems to concede this for purposes of argument.) This being so, the excess of the first degree murder sentence above the maximum which the evidence supports, presents the same constitutional problems as were decided in *Thompson v. Louisville,* 362 U.S. 199 and *De Jonge v. Oregon,* 299 U.S. 353. The California District Court of Appeal in effect overruled these constitutional contentions by stating that they were made but ignoring their content, for which reason petitioner submits that a Writ of Certiorari should be granted to the District Court of Appeal of the State of California, First Appellate District, Division Two, to bring up for decision the issue of *due process* which arises in the case, under the authority of the *Thompson* and *De Jonge* cases which, we submit, control it.

II. WHERE CONSTITUTIONAL ISSUES ARE INVOLVED THEY MAY BE RAISED AFTER TIME FOR APPEAL HAS EXPIRED (OR AFTER AFFIRMANCE).

In criminal cases, this court has always held that constitutional issues voiding any part of the judgment and sentence may be raised after the time for appeal has expired or after affirmance on appeal. See the following:

A. Extraordinary remedy granted to enforce federal right, time to appeal having expired without taking of appeal:

McNeal v. Culver (1961) 5 L. Ed. (2d) 445, 447;

Johnston v. Zerbst (1938) 304 U.S. 458, 462.

B. Extraordinary remedy granted to enforce federal right after affirmance on appeal:

Moore v. Dempsey, 261 U.S. 86;

Herndon v. Lowery, 301 U.S. 242 (cf. *Herndon v. Georgia,* 295 U.S. 441);

Petition of Carmen, 165 F. S. 942;

Also, *Mooney v. Holohan,* 294 U.S. 103.

III. IF STATE COURTS GRANT NO REMEDY TO PROTECT FEDERAL RIGHTS IN CRIMINAL CASES, UNITED STATES COURTS WILL DO SO.

If the state courts furnish no remedy to protect against violation of federal rights in criminal cases, the Federal Courts will do so. *Woods v. Nierstheimer,* 328 U.S. 211, 217.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari to the California District Court of Appeal, First Appellate District, Division Two, should be granted.

Dated, San Francisco, California,
August 11, 1961.

GEORGE OLSHAUSEN,
Attorney for Petitioner.

(Appendices "A", "B", "C", "D" and "E" Follow)

(Vol. 189 A.C.A. 329)

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Criminal No. 3770

The People of the State of California,
Plaintiff and Respondent,
vs.
Robert Burks,
Defendant and Appellant.

OPINION

This is an appeal from an order denying the petition of Robert Burks for a writ of error *coram nobis* and motion for the reduction of sentence.

The appellant was indicted for first degree murder on July 17, 1958. Trial by jury began on January 5, 1959; during the trial appellant's counsel and the district attorney stipulated that the death of the victim resulted from a gunshot wound from a gun fired by the defendant. Upon submission the jury found him guilty of first degree murder. Thereafter appellant waived his right to jury consideration of the

issue of the penalty which was then determined by the court and on January 22, 1959, the court sentenced him to the state prison for the term prescribed by law. No appeal was taken, and the appellant states his counsel did not inform him that he had a right to appeal.

The appellant's first contention is that the evidence was insufficient as a matter of law to show willful, deliberate and premeditated intent to kill required to sustain the finding of first degree murder. His argument is that the evidence actually showed he was engaged in defending himself. The evidence does not require a conclusion in accord with appellant's views, but more important, it is clear that this contention raises an issue of law which could have been dealt with on appeal. Hence the writ of error *coram nobis* cannot issue. (*People v. Martinez* (1948), 88 Cal. App.2d 767, 772 [199 P.2d 375].)

The appellant's next contention is that his counsel's failure to advise him of his right to appeal constituted deprivation of liberty without due process of law. It is difficult to accept this statement of appellant inasmuch as he was represented at all stages by capable counsel. However, even though we accept the proposition, it does not provide a ground for the issuance of the writ. (*People v. Gennaitte* (1954), 127 Cal.App.2d 544, 548 [274 P.2d 169].)

It has been repeatedly pointed out by our appellate courts that the writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on

motion for new trial or by appeal. It is issued to correct an error of fact, existing at the time of trial but unknown to the trial court through no fault of the petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment. (See *People v. Reid* (1924), 195 Cal. 249, 255 [232 P. 457, 36 A.L.R. 1435]; *People v. Tuthill* (1948), 32 Cal.2d 819, 821 [198 P.2d 505]; *People v. Martinez, supra,* at 771; *People v. Adamson* (1949), 34 Cal.2d 320, 326 [210 P.2d 13].)

The foregoing matters were presented in briefs which the appellant filed in propria persona. At the time for oral argument, counsel appeared on behalf of appellant and asked for time to review the case and make such argument as might be warranted. Time was granted and briefs have been filed, so we now consider the points thus presented.

Counsel points to that portion of appellant's application which carries the designation "Motion for the Reduction of Sentence" and contends that under such a pleading appellant can at this time and stage of the proceeding question the sufficiency of the evidence. Appellant cites us to Penal Code, section 1265, and contends that the provisions of this section imply that motions of this character lie even though no appeal has been taken. There is no merit in the argument, for section 1265 clearly provides the jurisdiction of the trial and appellate courts, after the issuance of the remittitur, to act with respect to subsequent proceedings in the case, and it confers on the

appellate court that disposed of the appeal the jurisdiction to act with respect to motions to vacate the judgment should any be made thereafter. The jurisdictional basis is entirely lacking here since no appeal was taken, and we are unable by any construction that we may put on the language of said section to develop any implication that lends support to the present proceeding.

The appellant then passes to Penal Code, section 1181, which sets forth the circumstances under which the trial court may grant a new trial, and particularly subdivision 6 thereof wherein the power is given the trial court in the first instance and any appellate court to which the cause may be appealed, instead of ordering a new trial, to modify the verdict, finding or judgment as to the degree of crime. Again we find no support for appellant's proposition, for the scope of the relief under this statute is limited to the pendency of the appeal and the power of the court therein since its purpose is to obviate the necessity of a new trial when the insufficiency of the evidence only goes to the degree of the crime. *(People v. Odle* (1951), 37 Cal.2d 52, 56 [230 P.2d 345].)

It has been established that where such relief is possible because requested during proper proceedings, the statute is only permissive. *(People v. Hill* (1953), 116 Cal.App.2d 212, 216 [255 P.2d 54].)

Further, the appellant's motion does not lie because motions are not independent rights or remedies, but imply a pendency of suits between the parties and are confined to matters collateral to the main objects

of the actions. Although *coram nobis* is properly regarded as a part of the proceeding to which it refers, when it does not lie there is no basis for an allegedly connected motion. (*People v. Sparks* (1952), 112 Cal. App.2d 120, 121 [246 P.2d 64].) In view of our determination that *coram nobis* does not apply, there is no action to which this motion may adhere. The appellant does not contend that the present judgment is void or illegally entered, but merely asserts that it is erroneous, so that even were we to treat this motion as one to vacate, it fails to qualify because the points made could have been presented on an appeal from the judgment. (*People v. Zolotoff* (1941), 48 Cal.App. 2d 360, 364 [119 P.2d 745].)

The arguments with reference to the alleged constitutional questions are ingenious but we are not convinced of their applicability. It is apparent that the appellant should have sought relief for the alleged insufficiency of the evidence through the historic remedial process provided, namely, appeal from the judgment.

Order affirmed.

Shoemaker, J.

Kaufman, P. J., and Draper, J., concurred.

Filed February 21, 1961.

Lawrence R. Elkington, Clerk.

Appendix "B"

In the District Court of Appeal
State of California
First Appellate District

Division Two

People of the State of California, Plaintiff and Respondent, vs. Robert Burks, Defendant and Appellant.	Criminal No. 3770

By the Court:

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated March 23, 1961

Kaufman, P. J.

Filed
Dist. Court of Appeal - First Dist.
Mar 23 1961
Lawrence R. Elkington, Clerk
By.....
Deputy

Appendix "C"

Order Due
April 21, 1961

In the Supreme Court of the State of California

In Bank

The People of the State of California,
Plaintiff and Respondent,
vs.
Robert Burks,
Defendant and Appellant.

Order Denying Hearing

After Judgment by District Court of Appeal
1st District, Division 2, Crim. No. 3770

Appellant's petition for hearing Denied.

Gibson
Chief Justice

Filed
Apr 19 1961
William I. Sullivan, Clerk
By R. Formichi
S. F. Deputy

Appendix "D"

Constitution of the State of California, Article VI, Sec. 5:

The superior courts shall have original jurisdiction in all . . . criminal cases amounting to felony . . . .

Constitution of the State of California, Article VI, Sec. 4a:

The state is hereby divided into three appellate districts, in each of which there shall be a District Court of Appeal . . . .

. . .

The first district shall embrace the following counties: San Francisco . . .

Constitution of the State of California, Article VI, Sec. 4b:

The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; . . . also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered. . . .

California Penal Code, Sec. 17: A felony is a crime which is punishable with death or by imprisonment in the state prison. . . .

California Penal Code, Sec. 187: Murder is the unlawful killing of a human being, with malice aforethought.

California Penal Code, Sec. 188: Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

California Penal Code, Sec. 189: All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, *or any* act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

California Penal Code, Sec. 190: Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of *the court or* jury trying the same, and *the matter of punishment* shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

California Penal Code, Sec. 190.1: The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any

plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life

in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

California Penal Code, Sec. 192: Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.

2. Involuntary—in the commisison of an unlawful act, not amounting to felony.; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle. . . .

California Penal Code, Sec. 193: Manslaughter is punishable by imprisonment in the State prison for not exceeding 10 years, except that a violation of subsection 3 of Section 192 of this code is punishable as follows: In the case of a violation of subdivision (a) of said subsection 3 the punishment shall be either by imprisonment in the county jail for not more than one year or in the State prison for not more than five years, and in such case the jury may recommend by their verdict that the punishment shall be by imprisonment in the county jail; in the case of a violation of subdivision (b) of said subsection 3, the punishment shall be by imprisonment in the county jail for not more than one year. In cases where, as authorized in this section, the jury recommends by their verdict that the punishment shall be by impris-

onment in the county jail, the court shall not have authority to sentence the defendant to imprisonment in the State prison, but may nevertheless place the defendant on probation as provided in this code.

California Penal Code, Sec. 1181: When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: . . .

6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed; . . .

California Penal Code, Sec. 1239: (a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council. . . .

Appendix "E"

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Criminal No. 3770

The People of the State of California,
Plaintiff and Respondent,
vs.
Robert Burks,
Defendant and Appellant.

APPELLANT'S OPENING BRIEF

The defendant-appellant, Robert Burks, was convicted in the Superior Court of San Francisco (San Francisco Superior Court, Crim. No. 55011) of first degree murder, for the killing of one Alex Wilson. He was sentenced to life imprisonment on January 22, 1959. (See Respondent's Br. p. 1, filed before present counsel appeared in the case.) No appeal was taken from this judgment.

Subsequently, on November 25, 1959, appellant, now in San Quentin Prison, filed in *propria persona*

a motion for reduction of sentence and also a petition for a writ of *coram nobis* in the Superior Court. Both were denied by the trial court on December 1, 1959. The present appeal is from this denial. The appeal was taken in *propria persona*. Present counsel were associated in the case shortly before September 12, 1960, the date set for oral argument. It is the view of counsel now representing appellant that the *Motion for* Reduction of Sentence presents the substantial issues of the appeal.

This motion raises two issues. Its substantive point is that the evidence is as a matter of law insufficient to support a conviction of first degree murder; there is also the procedural question, whether the point can be raised after the time for appeal has passed.

We consider these two questions in reverse order. *First*, we shall show that sufficiency of the evidence to support the charge on which the appellant is imprisoned involves a constitutional question which may be raised at any time. *Second*, the evidence is as a matter of law insufficient to sustain a conviction of first degree murder.

---

1. INSUFFICIENCY OF EVIDENCE TO SUPPORT CHARGE ON WHICH DEFENDANT IMPRISONED, MAY BE RAISED AT ANY TIME.

The point that insufficiency of the evidence to support the sentence may be raised at any time falls into two parts: (A) Constitutional Issues may be raised even after the judgment has become final for purposes of appeal; (B) sufficiency of the evidence to

support the charge on which defendant is imprisoned raises a constitutional question.

A. Constitutional Objections to Judgment May Be Raised at Any Time, Though Judgment Final for Direct Appeal.

It is well settled both in the United States Supreme Court and in California that constitutional infirmities in the judgment may be raised at any time, notwithstanding that the judgment may no longer be subject to direct attack on appeal. (Several of the United States Supreme Court decisions came up from California.)

Cf.:

Mooney v. Holohan, 294 U.S. 103;

Herndon v. Lowery, 301 U.S. 242, after the earlier decision in *Herndon v. Georgia*, 295 U.S. 441;

In re Bell, 19 C.2d 488, 495.

Compare also:

People v. Chessman, 52 C.2d 467.

Penal Code Section 1265 which provides that motions made after an appeal has become final shall be made in the court which has decided the appeal, proceeds from the premise that motions of the present type lie even after direct appeal proceedings have come to an end.

The provision of Penal Code Section 1181(6), providing that reduction of sentence may be granted on a motion for new trial, merely gives the court power to reduce the sentence in ruling on a motion for new trial; it does not say that that is the only time that

the defendant may move for reduction of sentence. Besides, the trial court's right to reduce the sentence on a motion for new trial is broader than that of the appellate court. (*People v. Thomas*, 25 C.2d 880, 905; *People v. Matlock*, 51 C.2d 682, 689; *People v. Todd*, 154 C.A.2d 601-610.) A motion made after the judgment has become final from the standpoint of direct appeal proceedings is limited to the point that the evidence is insufficient as a matter of law. It is therefore narrower than a motion under Penal Code 1181(6).

B. Insufficiency of Evidence to Support Charge on Which Defendant Imprisoned Raises Constitutional Issue.

1. We here consider the insufficiency *as a matter of law* to support the charge on which appellant is imprisoned—i.e., murder of the first degree. That is, resolving all conflicts and all conflicting inferences in favor of the prosecution, the record is still insufficient to show first degree murder. (We develop this argument in detail, infra.)

2. Two United States Supreme Court cases indicate that a constitutional question arises where a prisoner is confined for a crime greater than anything sustained by the evidence. The first is *De Jonge v. Oregon*, 299 U.S. 353, 362, and the second is *Thompson v. Louisville*, 362 U.S. 199, 4 L.Ed.2d 654.

In the *De Jonge* case the precise question was whether the defendant could be convicted of a crime not *pleaded*. The United States Supreme Court held this would be a denial of due process. It used broad language:

(p. 362) "Conviction upon a charge *not made* would be sheer denial of due process." (Emphasis added)

In *Thompson v. Louisville*, 4 L.Ed. 2d 654, the United States Supreme Court held in so many words that the same logic which governs conviction on a crime not pleaded, applies equally to convictions on a crime not proved.

Thompson v. Louisville, 4 L.Ed.2d 654, 659:

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to punish a man without evidence of his guilt."

The court had previously said, (p. 658): "The record is entirely lacking in evidence to support any of the charges."

It is true that in *Thompson v. Louisville* there was no question of a lesser or included offense. The evidence was held insufficient to prove any crime charged. But this clearly makes no difference. First, the sufficiency of the evidence is held to raise exactly the same problem as the sufficiency of the pleading did in *De Jonge v. Oregon*, 299 U.S. 353, and the *De Jonge* case *did* present the problem of several possible crimes. In fact the question was, when the crime charged was unsupported by evidence, whether the conviction might nevertheless be upheld for a crime not charged, which the evidence was thought to support. Yet *that* was held to deny due process of law.

Second, from a logical standpoint, the unsupported excess sentence presents exactly the same problem as a totally unsupported sentence. That is, for instance, if the evidence shows manslaughter and nothing more, and the defendant is imprisoned for murder, the excess of murder above manslaughter raises exactly the same problem as imprisonment where the evidence shows no crime at all. The contention that if the evidence supports any crime at all it yet, as a matter of law, fails to support a conviction of first degree murder, thus involves a constitutional question, which may be raised even after direct appeal proceedings have come to an end.

We now show that the evidence, as a matter of law, fails to support a charge of murder in the first degree.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 356

[illegible] BURTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STANLEY MOSK,

[illegible]

ARTHUR E. SUTRO,

[illegible]

Attorneys for Respondent People of the State of California,

[illegible] S. MCINERNY,

[illegible]

[illegible] R. GRANNIS,

[illegible]

Of Counsel.

Topical Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement of the case	2
Statement of facts	3
Argument	6
I. Petitioner's first degree murder conviction finds support in the evidence	6
II. The decision of the District Court of Appeal rests on adequate state grounds	8
Conclusion	9

Table of Cases

	Pages
DeJonge v. Oregon, 299 U.S. 353	6
Neal v. State, 55 A.C. 11, 9 Cal. Reptr. 607	9
People v. Blalock, 53 Cal.2d 798, 3 Cal. Reptr. 137	8
People v. Brubaker, 53 Cal.2d 37, 40, 346 P.2d 8, 9	7
People v. Burks, 189 A.C.A. 329, 331, 11 Cal. Reptr. 200, 201	1
People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375	8
Thompson v. Louisville, 362 U.S. 199	6
Williams v. Kaiser, 323 U.S. 471, at 477	8, 9

Codes

Calif. Pen. Code § 189	7
28 U.S.C. section 1257(2)	2

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No. 356

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OPINIONS BELOW

On February 21, 1961, the District Court of Appeal, First Appellate District, Division Two, filed a decision and opinion affirming an order of the Superior Court of the City and County of San Francisco denying petitioner's application for a writ of error *coram nobis*. (*People v. Burks*, 189 A.C.A. 329, 11 Cal. Reptr. 200.) Petition for rehearing was de-

nied on March 23, 1961 and the Supreme Court of California denied a hearing on April 19, 1961.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under title 28, U.S.C. section 1257(2).

QUESTIONS PRESENTED

1. Whether on the basis of the record in the instant case there is such an insufficiency of evidence so as to render petitioner's conviction of murder in the first degree a denial of due process of law.

2. Whether the decision of the District Court of Appeal rests on an adequate state ground and is thus not properly subject to review on certiorari.

STATEMENT OF THE CASE

On July 17, 1958, petitioner was charged by indictment with murder in the first degree. On January 5, 1959, a jury was empaneled and trial commenced. Petitioner was found guilty as charged and on January 22, 1959, jury determination of the penalty having been waived, the Court sentenced petitioner to state prison. No appeal was taken from the judgment. (See 189 A.C.A. 329, 330, 11 Cal. Reptr. 200, 201.)

On November 25, 1959, petitioner filed in the Superior Court of the City and County of San Francisco, a *pro-se* document denominated "Petition for the Writ of Error Coram Nobis and Motion for the Reduction of Sentence" (CT 1-4). On December 1, 1959, the petition and motion were denied *ex parte* (CT 20) and on December 9, 1959, petitioner noticed an appeal from the order of denial (CT 20-22). As noted above, the District Court of Appeal affirmed the order, and petitions for rehearing and for hearing in the Supreme Court of California were denied.

STATEMENT OF FACTS

At the trial, it was stipulated that appellant shot and killed the victim, one Alex Wilson. (RT 1, 75.) The following evidence disclosed the circumstances surrounding the homicide:

On July 5, 1958, petitioner Burks was driving his car on O'Farrell Street in San Francisco. With him were his wife Janet and two friends, Mr. and Mrs. Woods. (RT 268, 367.) Nearing his home, Burks saw an open space along the curb and started to back into it when one Wilson, the victim, drove up behind Burks and interfered with his attempt to park. (RT 269, 367-368, 469.) There was apparently no contact between the two vehicles at this time. (See below, and RT 85, 115, 275.)

Burks got out of his car without any assistance and went over to Wilson. (RT 84, 89, 116, 272.) The two

swore at each other, Burks calling Wilson a "black son of a bitch" and threatening, in an obscene manner, to beat him up. (RT 84, 369.) Wilson expressed disbelief. (RT 84.) Then Mrs. Burks, as she was leaving Burks' car, accidentally hit the gearshift or the accelerator, causing the car to back against Wilson's. (RT 85, 114, 115, 275.)

Wilson obtained a bumper jack which he waved in the air. (RT 29, 349.) But when Burks' son-in-law, at the request of Mrs. Burks, drove the car off (RT 167, 275), Wilson put the tool back in his trunk. (RT 153, 163, 173, 532-533.)

No blows were struck in the course of this encounter (RT 31, 274, 532), the two being no closer than ten feet during this time. (RT 361.) Burks, however, testified that Wilson hit him with the jack. (RT 512.) During this time, Wilson was alone while Mr. and Mrs. Woods were with Burks and his wife, together with one Brad Holloway, who happened upon the scene. (RT 347.)

After a few minutes of argument Burks left, saying that he would be back. (RT 31, 86.) Holloway, in an effort to end the argument, escorted Burks across the street. (RT 258, 350.) Burks, without assistance, climbed three flights of stairs to his apartment. (RT 477-478.) There he got out his revolver, loaded it with six rounds (RT 220, 258-259), and put it in his pocket. Burks then went down to the street (RT 220) and walked from his house, again without assistance, although there was testimony that he was limping. (RT 421.)

Burks walked out into the street (RT 193-194) but did not cross the center line. (RT 137.) The pistol was partially visible in Burks' pocket. (RT 124.) Somebody called to Wilson, who was unloading his car (RT 66), that Burks had a gun. (RT 93, 135, 154.) Wilson stepped out from behind his car and turned in the direction of Burks (RT 49, 534), and took two or three steps toward him. (RT 55-56, 155.) Wilson had nothing in his hands, and kept them at his side. (RT 33-34, 56, 139, 163, 203.)

Mrs. Burks went over to her husband to stop him from shooting Wilson. (RT 156, 158.) He shoved her aside and called to Wilson that he was going to shoot him. (RT 162.) Burks pulled out his revolver and shot Wilson from a distance of from six to twenty feet. (RT 159, 187, 193, 261.) There were no powder marks on the body. (RT 5.)

Burks testified that he had been partially paralyzed as the result of a previous industrial injury (RT 468), and that he shot Wilson because the latter was coming after him with a bumper jack. (RT 528.) He admitted two prior felony convictions. (RT 523.) The tool, however, was subsequently found in the locked trunk of Wilson's automobile. (RT 204-206, 223.)

ARGUMENT

I

PETITIONER'S FIRST DEGREE MURDER CONVICTION FINDS SUPPORT IN THE EVIDENCE

Petitioner contends that his conviction of murder in the first degree was in violation of his constitutional rights because there was no evidence to support it. In support of his contention he relies upon *DeJonge v. Oregon,* 299 U.S. 353, and *Thompson v. Louisville,* 362 U.S. 199, which hold that a total insufficiency of either the pleading or the evidence to support a conviction will amount to a denial of due process. Respondent does not disagree with those decisions and is somewhat inclined to accept the theoretical soundness of petitioner's extension of the principles enunciated in those decisions, to the situation where the evidence, though sufficient to support a conviction of an included offense, is insufficient to support a conviction of a higher degree crime. But both of petitioner's arguments, and the *DeJonge* and *Thompson* cases, are simply not applicable to the record at bar.

Throughout the petition, it is asserted that the District Court of Appeal agreed with petitioner's contention that the evidence did not support a conviction of murder in the first degree. As a matter of record, however, the District Court of Appeal considered petitioner's argument relating to the asserted insufficiency of the evidence and summarily rejected it, stating, "the evidence does not require a conclusion in accord with appellant's views." (189 A.C.A. at 331, 11 Cal.

Reptr. at 201.) As will be seen, this disposition of the question was manifestly correct. And when it is demonstrated that petitioner's constitutional argument finds no support in the record, then his attempt to obtain a writ of certiorari must necessarily fail.

Under California law "All murder which is perpetrated . . . by any . . . wilful, deliberate and premeditated killing . . . is murder of the first degree. . . ." (Cal. Pen. Code §189.) And "proof of deliberation, premeditation and wilfulness may be inferred from facts and circumstances which furnish a reasonable foundation for such a conclusion." (*People v. Brubaker,* 53 Cal. 2d 37, 40, 346 P. 2d 8, 9.) Applying these rules to the facts of this case, it is readily apparent that the conviction of first degree murder is supported by the evidence. Note that petitioner voluntarily left the scene of the argument, went upstairs to his apartment, got out his revolver and loaded it, returned to the street, shoved his wife aside when she attempted to dissuade him from his purpose, declared his intention to shoot Wilson and then shot him dead. Such a record is hardly an appropriate vehicle for an assertion that the evidence is insufficient to support a conviction of first degree murder, let alone that such insufficiency assumes constitutional proportions.

II

THE DECISION OF THE DISTRICT COURT OF APPEAL RESTS ON ADEQUATE STATE GROUNDS

In *Williams v. Kaiser,* 323 U.S. 471 at 477, this Court declared that

> "it is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause (citations). And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it."

Here, the decision of the District Court of Appeal, in addition to determining that petitioner's claim of insufficiency was not supported by the record, went on to hold that in any event the writ of error *coram nobis* is not the appropriate procedural device for a post-conviction review of the sufficiency of the evidence. This ground of the decision is in accord with well-established California law. (See *People v. Blalock,* 53 Cal. 2d 798, 3 Cal. Reptr. 137; *People v. Martinez,* 88 Cal. App. 2d 767, 199 P. 2d 375.)

Moreover, California, in refusing petitioner relief in the nature of the writ of error *coram nobis,* has not necessarily precluded him from challenging the constitutional validity of the judgment in a post-conviction proceeding. Under California law, the writ of habeas

corpus might still be available to him in the Courts of this state, and if it is, then the writ will lie to review the sufficiency of the evidence to support the judgment of conviction if that evidence does, in fact, fail completely to show that the murder was committed by petitioner. (See, e.g., *Neal v. State,* 55 A.C. 11, 9 Cal. Reptr. 607.) Since California does afford petitioner a procedure for litigating his claim of a denial of due process, and since petitioner has not as yet chosen to avail himself of such remedy, his attempt to obtain relief in this Court is premature. (*Williams v. Kaiser,* supra.)

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

STANLEY MOSK,
Attorney General of the State of California.
ARLO E. SMITH,
Deputy Attorney General of the State of California.
BY ARLO E. SMITH,
Attorneys for Respondent People of the State of California.

JOHN S. MCINERNY,
Deputy Attorney General of the State of California.
ROBERT R. GRANUCCI,
Deputy Attorney General of the State of California,
Of Counsel.

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

Cases

	Page
Neal v. State, 55 A.C. 11, 19 Cal. Reptr. 607	4
People v. Bridgehouse, 47 Cal. 2d 406, 303 P. 2d 1018	5
People v. Holt, 25 Cal. 2d 59, 153 P. 2d 21	5
People v. Howard, 211 Cal. 322, 295 P. 333	5
People v. Kelly, 208 Cal. 387, 263 P. 226	5
People v. Moreno, 6 Cal. 2d 480, 58 P. 2d 629	5
People v. Slater, 60 Cal. App. 2d 353, 140 P. 2d 846	5
People v. Tubby, 34 Cal. 2d 72, 207 P. 2d 51	5
Williams v. Kaiser, 323 U.S. 471	4

Codes

California Penal Code:	
Section 654	4
Section 664	4

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I. On page 6 of its Opposition to Petition for Certiorari Respondent says:

> "Throughout the petition, it is asserted that the District Court of Appeal agreed with petitioner's contention that the evidence did not support a conviction of murder in the first degree. As a matter of record, however, the District Court of Appeal considered petitioner's argument relating to the asserted insufficiency of the evidence and summarily rejected it, stating, 'the evidence does not require a conclusion in accord with appel-

lant's views' (189 ACA at 331, 11 Cal. Reptr. at 201)"

First, we asserted that *for purposes of argument* the District Court of Appeal assumed that the evidence does not show murder of the first degree. See Petition for Writ of Certiorari, pp. 3, 5 (italics), 7 (italics).

Second, a reading of the opinion (Appendix A to the Petition for Certiorari) will show that the above quoted language was directed to the petition for a writ of *coram nobis,* seeking a *complete exoneration* of petitioner, *not to the motion for reduction of sentence.* The language of the District Court of Appeal to which respondent refers may be found at page ii of Appendix A to the Petition and reads as follows:

> (App. A, p. ii) "The appellant's first contention is that the evidence was insufficient as a matter of law to show willful, deliberate and premeditated intent to kill required to sustain a finding of first degree murder. *His argument is that the evidence actually showed he was engaged in defending himself. The evidence does not require a conclusion in accord with appellant's views,* but more important, it is clear that this contention raises an issue of law which could have been dealt with on appeal. Hence the writ of error *coram nobis* cannot issue." (English italics added.)

Then the District Court of Appeal says:

> (App. A, p. iii) "The foregoing matters were presented in briefs which the appellant filed in propria persona. At the time for oral argument, counsel appeared on behalf of appellant, and asked for time to review the case and to make

> such arguments as might be warranted. Time was granted and briefs have been filed, so we now consider the points thus presented.
>
> "Counsel points to that portion of appellant's application which carries the designation, 'Motion for Reduction of Sentence' and contends that under such a pleading appellant can at this time and stage of the proceeding question the sufficiency of the evidence."

This evidently refers to something other than the language quoted from page ii of Appendix "A" (supra)—which deals with the *complete exoneration* of the appellant. At Petition for Writ of Certiorari, pages 1-2, we expressly state that the Petition for Certiorari is limited to "review the latter court's affirmance of an order of the said Superior Court *denying defendant-petitioner's motion to reduce the judgment to something less than murder of the first degree*, on the ground that, as a matter of law under California law, the evidence did not show murder of the first degree, i.e., did not show the crime for which defendant-petitioner was adjudged guilty and imprisoned, but showed a different and lesser crime, if any."

At Appendix E, page xiv of the Appendix to the Petition for Certiorari, counsel for petitioner stated expressly that in their view, "the motion for Reduction of Sentence presents the substantial issues of the appeal".

This shows that the Petition for Certiorari deals wholly and solely with the motion for reduction of sentence. The other motion before the California

courts (the petition for a writ of error *coram nobis*) seeking a complete exoneration has not been made a subject of the present petition for certiorari. Yet the language quoted at page 6 of Respondent's Opposition to Petition for Certiorari refers solely to this other petition for a writ of error *coram nobis,* which claimed complete exoneration in the state court and *which has not been brought before the United States Supreme Court.*

II. On page 8 of the Respondent's Opposition to Petition for Writ of Certiorari, the Attorney General of the State of California says that *habeas corpus* is available to the petitioner as a post-conviction remedy. It needs only to be said that the District Court of Appeal to which this petition is directed, *does not say this.* (Pet. Cert. App. "A".)

Neal v. State, 55 A.C. 11, 17, 19 Cal. Reptr. 607 (Resp. Opposition, p. 11) holds that *habeas corpus* is a proper remedy to review the question as to whether Cal. Pen. Code Sec. 654 governs the question of multiple punishments, and whether there has been a misinterpretation of Cal. Pen. Code 664. At that, the Writ of Habeas Corpus was denied.

Williams v. Kaiser, 323 U.S. 471 (Resp. Opp. pp. 7, 8) held in favor of the prisoner so far as right to counsel was concerned. It does not hold the Petition for Certiorari to be premature.

III. On pages 3-5 of Respondent's Opposition, and again at pages 6, 7, the Attorney General of the State of California argues the merits of the question whether the record contains evidence supporting a

conviction of murder of the first degree, or only of some lesser offense. As we have already said, *the District Court of Appeal does not examine this question.* (Pet. for Cert., App. "A", pp. iii-v.)

It need only be said here that appellant discussed this question in the state court referring to the evidence (which has not been brought up, but which can be brought up if the court wishes), and citing the following California cases:

People v. Bridgehouse, 47 Cal. 2d 406, 303 P. 2d 1018;

People v. Holt, 25 Cal. 2d 59, 153 P. 2d 21;

People v. Howard, 211 Cal. 322, 295 P. 333;

People v. Kelly, 208 Cal. 387, 263 P. 226;

People v. Moreno, 6 Cal. 2d 480, 58 P. 2d 629;

People v. Slater, 60 Cal. App. 2d 353, 140 P. 2d 846;

People v. Tubby, 34 Cal. 2d 72, 207 P. 2d 51.

Especial emphasis was placed on *People v. Holt,* 25 Cal. 2d 59, 153 P. 2d 21.

But the District Court of Appeal does not discuss this question at all.

We submit that the Attorney General cannot avoid certiorari by arguing a question which the District Court of Appeal simply did not discuss.

Dated, San Francisco, California,
October 2, 1961.

Respectfully submitted,

GEORGE OLSHAUSEN,
Attorney for Petitioner.